United Nations S/2009/687

# Security Council

Distr.: General
31 December 2009

Original: English

## Letter dated 30 December 2009 from the Chargé d'affaires a.i. of the Permanent Mission of Austria to the United Nations addressed to the President of the Security Council

On behalf of the chair of the Security Council's Informal Working Group on International Tribunals, Ambassador Thomas Mayr-Harting, I have the honour to transmit the attached letter summarizing the activities of the Informal Working Group during the period from 1 January to 31 December 2009 (see annex). I should be grateful if you could circulate this letter together with its annex as a document of the Security Council.

(*Signed*) Christian **Ebner**
Ambassador
Chargé d'affaires a.i.

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# Annex to the letter dated 30 December 2009 from the Chargé d'affaires a.i. of the Permanent Mission of Austria to the United Nations addressed to the President of the Security Council

## I. Introduction

1. This letter is to inform the Security Council about the work of the Informal Working Group on International Tribunals ("the Working Group"), covering the period from 1 January to 31 December 2009,[1] during which Austria had the honour to chair the Working Group. In particular, I would like to update the Council on the progress made by the Working Group on the issue of the establishment of a residual mechanism to carry out certain essential functions of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (together "the Tribunals") after their closure.

## II. Organizational matters

2. The Working Group was established on an informal basis in 2000 to consider matters relating to the United Nations and United Nations-assisted Tribunals, particularly the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. The Working Group consists of the legal advisers of the Missions of the members of the Security Council and is assisted by the Office of Legal Affairs. Until 2007, its chairmanship rotated with the monthly rotation of the presidency of the Council and it met only on an ad hoc basis. At the end of 2007, given the intensive work relating to residual issues and the completion strategies of the Tribunals pursuant to Security Council resolutions 1503 (2003) and 1534 (2004), the Working Group decided to appoint a single chair and started meeting on a regular basis. In 2008 the chairmanship of the Working Group was held by Belgium and in 2009 it was taken over by Austria.

3. During the reporting period the Working Group continued to meet regularly and held 26 meetings, including with the Presidents and Prosecutors of the Tribunals when in New York for their presentations to the Security Council. The members of the Working Group also had informal exchanges of views with the President, Registrar and members of the Management Committee of the Special Court for Sierra Leone, as well as with representatives of the Netherlands, Rwanda and Serbia, to continue the dialogue with affected countries and host countries of the Tribunals.

## III. Security Council briefings and Arria formula meeting

4. Following previous practice, the representative of Austria, in his capacity as chair, briefed the Security Council on the progress of the Working Group as part of his statements at the biannual public meetings of the Security Council on the completion strategies of the Tribunals, on 4 June (S/PV.6134) and 3 December 2009 (S/PV.6228).

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[1] For a detailed account of the activities of the Working Group during 2008 see the letter dated 19 December 2008 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council (S/2008/849); see also the annual report of the Security Council for the period from 1 August 2008 until 31 July 2009 (A/64/2), pp. 239 and 240.

5. In order to increase transparency, raise awareness and provide an opportunity to hear the views of expert speakers and the broader United Nations membership on the various key issues related to the establishment of the residual mechanism, on 8 October 2009 the Permanent Mission of Austria organized an Arria formula meeting on residual issues of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda open to all Member States of the United Nations. Invited speakers included the Presidents of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the Assistant Secretary-General for Legal Affairs, as well as representatives of the International Committee of the Red Cross and the International Center for Transitional Justice. The meeting met with great interest from many Member States, which provided the Working Group with very useful input for its deliberations.

## IV. Report of the Secretary-General on residual issues

6. On 21 May 2009, the Secretary-General submitted his report on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals (S/2009/258), which had been requested by the Security Council in its presidential statement of 19 December 2008 (S/PRST/2008/47). The report provides valuable information about the eight potential residual functions identified by the Tribunals: (i) trial of fugitives; (ii) trial of contempt cases; (iii) protection of witnesses; (iv) review of judgements; (v) referral of cases to national jurisdictions (including revocation); (vi) supervision of enforcement of sentences; (vii) assistance to national authorities; and (viii) management of the archives.

7. The report also addresses other important issues such as the period prior to the commencement, the start date, jurisdictional continuity and duration of the mechanism(s). It discusses the potential structure and organization of the future residual mechanism(s) and provides tentative estimates for staffing and costs based on various illustrative examples of residual mechanisms where a "minimal", "middle" and "maximum" level of residual functions are carried out by the mechanism(s). It further analyses 14 potential locations for the Tribunals' archives and/or residual mechanism(s) — 13 United Nations offices in various locations plus the International Criminal Court. Finally, the report concludes with 13 concrete recommendations addressed to the Security Council and the Tribunals.

8. The report of the Secretary-General, which was prepared by the Office of Legal Affairs, has provided an excellent basis for the deliberations of the Working Group and the preparation of the new draft resolution on the establishment of the residual mechanism (see below). After a first round of discussions on the contents and recommendations of the report in July 2009, the Working Group reached agreement in September 2009 on recommendations (l) and (m), addressed to the Tribunals, in paragraph 259 of the report. By a letter dated 28 September 2009 (S/2009/496), the President of the Security Council confirmed that the Council members welcomed these recommendations and requested that the Secretary-General write to the Presidents of the Tribunals to ask that they ensure that the listed tasks are carried out as part of their completion strategies, and that they report to the Security Council on their progress in implementing these tasks as part of their regular reporting (see S/2009/587 and S/2009/589).

## V. The Working Group's consideration of the future residual mechanism

9. During the first half of 2009, the Working Group met nearly every week to move forward with the discussions on the establishment of the future residual mechanism. The Group continued with an in-depth examination of the residual functions identified by the Tribunals as essential to be carried out after their closure (see para. 6 above). It also discussed the potential commencement date(s) of the mechanism(s) and its (their) structure, including whether there should be one or two mechanisms, or one mechanism with two branches, and the related questions of the possible co-location of the Tribunals' archives with the mechanism(s), and its (their) location. The discussions were informed by the chair's non-papers with input from the Tribunals, which were produced with the assistance of the Office of Legal Affairs.

10. Following the discussions on the report of the Secretary-General from July to September 2009 (see para. 8 above), during the last part of the year the Working Group resumed its negotiations on a new draft resolution on the establishment of an international residual mechanism for the tribunals prepared by the chair of the Working Group with the help of the Office of Legal Affairs, based on the recommendations contained in the report of the Secretary-General. The Working Group finished the first reading of the draft resolution in December 2009 and will resume its negotiations early next year.

11. Building on the elements agreed in 2008, as summarized in the presidential statement of 19 December 2008 (S/PRST/2008/47) and the letter dated 19 December 2008 from the Permanent Representative of Belgium,[1] the discussions in the Working Group focused on the following key issues:

### *(a) Structure and organization of the mechanism*

12. As regards the structure of the mechanism, in the light of the different views regarding the question of whether there should be one or two mechanisms, the chair has proposed — as a possible "middle ground" — to establish one mechanism with two branches, located in Europe and Africa respectively (see also para. 13 below). In practice, as pointed out in the report of the Secretary-General, there may be little difference, because in either scenario it will be possible to share certain administrative services and organs. The report further advises to maintain the existing structure of the Tribunals, namely the chambers (including the Office of the President), the Prosecutor and the Registry. The mechanism will have active periods when there are trials ongoing and dormant periods when there are not. While there would be a need for a head of administration for each branch, the mechanism could have a single President, Prosecutor and Registrar, whose full-time presence would not be necessary during dormant periods. To ensure that the mechanism could be activated promptly and efficiently for trial, it would not only be based on a roster of judges, but would also make use of rosters of experienced staff, including legal officers, prosecution and defence counsel, interpreters and translators.

### *(b) Location of the mechanism and the archives*

13. According to the report of the Secretary-General, a number of factors suggest strongly that the archives should be co-located with the mechanism(s) at locations in Africa and Europe. The report also notes that, given that there are other United Nations-assisted criminal tribunals which will sooner or later require residual

mechanisms with functions very similar to those of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, a longer term strategic view would suggest attaching each to one common administrative hub at some point in the future, which might be an existing United Nations office, or the International Criminal Court, as the only permanent international criminal tribunal.

***(c) Commencement date of the mechanism***

14. The question of the commencement date of the mechanism or its branches involves a number of complex practical and legal questions (e.g. continuity of jurisdiction and/or possible conflict of competence), since the Tribunals are unlikely to complete their trials and appeals simultaneously and some fugitives may be arrested only at a very advanced stage of completion of the Tribunals' work. Among the various options discussed is the determination of a specific start date by the Security Council or the linkage to a trigger (e.g. completion of trials and appeals). Alternatively, given the uncertainties involved, the chair has proposed to consider a two-stage approach of establishing the mechanism in principle, followed by a later decision on the commencement date(s) of the mechanism or branches.

***(d) Fugitives to be tried by the mechanism***

15. It is essential that the legacy of the Tribunals not be tarnished through the failure to prosecute all indictees. The ability to try fugitives will therefore be an essential function of the mechanism. There are currently 13 fugitives at large. There is agreement that the most senior fugitives must face international trial by the mechanism. However, unless by the time of closure of the Tribunals all intermediate- or lower-rank accused have successfully been referred to national jurisdictions, the Security Council will need to consider whether the residual mechanism will assume jurisdiction over all the remaining fugitives or how to ensure that they are referred to national jurisdictions willing and able to try them fairly, so that they do not enjoy impunity.

***(e) Residual functions of the mechanism***

16. In relation to "new" trials of fugitives by the residual mechanism, the report of the Secretary-General recommends that all the functions necessary to support the trials be transferred to the mechanism in order for it to conduct trial proceedings effectively. In relation to "old" trials conducted by the Tribunals, it is still under discussion which of these functions should be continued by the mechanism, and which might possibly be transferred to other suitable bodies, such as national jurisdictions. The need for a small and cost-effective mechanism is a key factor. Although transferring as few functions to the mechanism as possible might seem attractive, the report of the Secretary-General has also established that the number of residual functions transferred is likely to have a far less significant impact on costs than whether the mechanism is conducting a trial or not. The report also points out that the transfer of certain functions to national jurisdictions may lead to inconsistent treatment and a possible impact on the rights of individuals.

## VI. Mandates of judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda

17. In order to facilitate the completion strategies, the Working Group also considered various requests by the Presidents of the Tribunals, including inter alia the extension of the judges' terms of office, the redeployment of judges to the Appeals Chamber and, as a temporary measure, the appointment of additional ad litem judges. Following negotiations and agreement reached among its members, the Working Group made recommendations to the Security Council for the adoption of appropriate resolutions. As a result, the Council adopted resolutions 1877 (2009), 1878 (2009), 1900 (2009) and 1901 (2009).

18. In resolutions 1877 (2009) and 1878 (2009), adopted on 7 July 2009, the Security Council, inter alia, decided to review the extension of the terms of office of the appeals judges by 31 December 2009, extended the terms of office of specified permanent judges (and those appointed to replace them) and ad litem judges at the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda until 31 December 2010, or until the completion of the cases to which they are assigned if sooner, allowed certain ad litem judges to serve in the Tribunals beyond their maximum cumulative period of service and authorized the Secretary-General, until 31 December 2009, to appoint additional ad litem judges at the International Tribunal for the Former Yugoslavia in excess of the statutory maximum of 12 up to a maximum of 13. The Council also decided to amend the respective provisions of the Tribunals' Statutes to allow for the enlargement of the Appeals Chamber through the redeployment of trial judges.

19. In resolutions 1900 (2009) and 1901 (2009), adopted on 16 December 2009, the Security Council, inter alia, underlined its intention to extend, by 30 June 2010, the terms of office of all trial judges based on the Tribunals' projected trial schedules and the terms of office of all appeals judges until 31 December 2012, or until the completion of the cases to which they are assigned if sooner, requested the Presidents of the Tribunals to submit to the Council updated trial and appeals schedules, decided that, notwithstanding the expiry of their terms of office on 31 December 2009, two ad litem judges at the International Tribunal for the Former Yugoslavia and one permanent judge at the International Criminal Tribunal for Rwanda should complete the cases they began before the expiry of their terms of office, allowed those ad litem judges to serve in the Tribunals beyond their maximum cumulative period of service and decided that the total number of ad litem judges serving at the International Tribunal for the Former Yugoslavia might temporarily exceed the statutory maximum of 12, up to a maximum of 13, until 31 March 2010, and that the total number of ad litem judges serving at the International Criminal Tribunal for Rwanda might temporarily exceed the statutory maximum of 9, to a maximum of 12, until 31 December 2010.

## VII. Conclusion

20. Austria was pleased to be asked to chair the Working Group during 2009 and stands ready to continue to facilitate its work. The Working Group has made important progress to advance the discussions on the establishment of the residual mechanism and to support the efforts of the Tribunals to implement the completion strategies. It has greatly benefited from the most valuable support and input provided by the Office of Legal Affairs and will continue to draw on their excellent

expertise in the future. In order to maintain the momentum that has been generated, it is intended that the Working Group will resume negotiations early next year and continue with the second reading of the new draft resolution on the establishment of the residual mechanism with a view to resolving the outstanding questions. As the legal advisers of the new members of the Security Council have been attending the meetings of the Working Group for the past few weeks, they will be in a position to pick up all issues without delay. With sufficient common ground and political will among the members, a consensus resolution appears to be well within grasp.